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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

October 8, 1999

Roy Stewart,
Chief, Mass Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MM Docket No. 98-203

Dear Mr. Stewart:

In response to your request in the above captioned proceeding, we have researched what Congress may have meant by "otherwise transmitted" in Section 399B of the Communications Act. As you know, Section 399B was enacted as part of the Omnibus Budget Act of 1981 and restricts the activities of noncommercial licensees. Section 399B defines "advertisement" to include messages or programming "broadcast or otherwise transmitted" by a licensee, but the language of prohibition forbids only the "broadcast" of advertisements and makes no reference to signals "otherwise transmitted." As you know, it is our position that this choice of words was intentional, designed as it was to afford public television stations flexibility in managing their ancillary and supplementary spectrum.

Although there is little direct legislative history on the language of Section 399B, there is substantial evidence that members of Congress intentionally made the distinction between signals broadcast and signals "otherwise transmitted" when enacting Section 399B. In particular, members of Congress logically were aware of a variety of technologies whereby licensees could "otherwise transmit" their signals without broadcasting them to the public at large. "Non-broadcast" technologies in use in 1981 included use of the vertical blanking interval, teletext, the instructional television fixed service, the broadcast auxiliary service, and cable. For your reference, I have enclosed a short legal memo to address the issue of how the language "otherwise transmitted" in Section 399B can be reasonably interpreted.

Should you have any further questions or concerns, please do not hesitate to contact me.

Sincerely,

Marilyn Mohrman-Gillis

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs

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ANALYSIS OF SECTION 399B OF THE COMMUNICATIONS ACT

A. Background

In the APTS comments submitted to the FCC, we have argued that public television stations should be allowed to engage in remunerative activities, including advertiser-supported services on ancillary and supplementary digital capacity, so long as such activities do not interfere with a station's noncommercial mission. At issue is whether the language in Section 399B of the Communications Act is consistent with that position.

B. Argument

Section 399B defines "advertisement," as including messages or programming "broadcast or otherwise transmitted." This definition is broader than the language in section 399B that restricts advertising on public broadcasting. That provision provides that "no public broadcast station may make its facilities available to any person for the broadcasting of any advertisement."[1] A reading of the clear language of that statute, in accordance with the rules of statutory construction clearly shows that Congress did not intend to restrict advertiser-supported services on a noncommercial station's non-broadcast operations that such stations may "otherwise transmit."[2]

The legislative history of section 399B supports this interpretation. Section 399B was passed in August 1981 as part of the Omnibus Budget Act and contains little legislative history directly on point. However, the House Conference Report states:

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[1] 47 U.S.C. § 399B(b)(2).

[2] To read the statute otherwise would render the phrase "otherwise transmitted" mere surplusage, in violation of the presumption that every word of a statute should be given effect. Further, our position is consistent with the well accepted cannons that different provisions of a statute are to be read together, and that where more specific language follows general language, the more specific language controls. Moreover, there is a presumption of rationality in reading statutes, and so one should conclude that omission of "otherwise transmitted" in the language of prohibition was intentional.

> "HR 3238 authorized public broadcast stations to offer certain facilities, services, and products for remuneration, but barred the broadcast of advertisements."[3]

Significantly, the House Report does not indicate that Congress intended to bar both broadcast and non-broadcast advertisements.[4]

The phrase "otherwise transmitted" also has clear meaning given the technologies available in 1981 when the legislation was under consideration. At the time the statute was being deliberated, several forms of "non-broadcast" transmission services were being used or had been used by television stations. It is therefore reasonable to suppose that Congress was fully aware of these developments and intentionally considered them when legislating.

C. Technologies "Otherwise Transmitted"

As early as 1970, after being aware of the practice for some time, the Commission officially permitted television licensees to transmit coded information, which was intended only for use by networks and their affiliates for signaling and cueing purposes, in conjunction with broadcasts.[5] One method was to employ audio tones for signaling purposes with no attempt to prevent their reception by the public. A second

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[3] House Conference Report, 97-208, 1981 U.S.C.C.A.N. 396, at 1257.

[4] The term "broadcasting" is defined in the Communications Act as "the dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(6). The Commission has further clarified that the term "broadcasting" "refers only to those signals which the sender intends to be received by the indeterminate public." Subscription Video, 2 FCC Rcd 1004 (1987), aff'd sub nom. National Association for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988). See also In the Matter of Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Television Licensees, Notice of Proposed Rule Making, MM Docket 98-203, FCC 98-304, (1998) ¶37 (tentatively concluding that section 399B does not apply to subscription services on DTV channels, because such services do not constitute "broadcasting"). NTIA also currently defines broadcast as "the distribution of electronic signals to the public at large using television (VHF or UHF) or radio (AM or FM) technologies." 15 C.F.R. §2301.2 (January 1, 1998).

[5] Use of Special Signals for Network Purposes which Adversely Affect Broadcast Service, Report & Order, FCC 70-387, 22 F.C.C. 2d 779 (1970).

method was to display a blank square or similar marker in the upper right hand corner of the screen. Concerned about the degradation in picture quality caused by such methods, the FCC required broadcasters to seek FCC permission before employing such transmissions.

By 1977, a new technology had emerged to replace the perceptible methods of transmitting information in conjunction with broadcasts: the use of the aural baseband subcarrier. At that time, the rules permitted aural subcarriers to be used only by remotely controlled television stations to telemeter information from the transmitter site to the remote control point.[6] In 1977, petitioners requested the FCC to allow expanded use of such technology.[7] On June 30, 1981, the Commission adopted a Report and Order[8] which established new rules allowing the use of TV aural baseband subcarriers for electronic newsgathering and coordination. This was the same year and over a month prior to the passage of what would become section 399B of the Communications Act.[9] It is therefore reasonable to suppose that members of Congress were aware of this non-broadcast technology at the time that section 399B was passed.

In addition to issues surrounding the use of coded information and the use of the aural baseband subcarrier, Congress likely was aware of the use of teletext

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[6] Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters, Notice of Proposed Rule Making, 48 Fed. Reg. 37475, FCC 83-364 (1983), ¶4.

[7] The same year, the Commission issued a Notice of Inquiry. 42 Fed. Reg. 38606 (1977). This was followed by a Notice of Proposed Rulemaking in 1979. 44 Fed. Reg. 70201 (1979).

[8] 49 R.R. 2d 1562 (1981).

[9] In 1983, the FCC again responded to petitions for expansion of the aural baseband subcarrier service and issued a Notice of Proposed Rule Making, 48 Fed. Reg. 37475 (1983), and a subsequent Report and Order, Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters, 2d Report & Order, 49 Fed. Reg. 18100 (1984), expanding the service to include cueing, coordination of electronic newsgathering, television stereophonic sound, bilingual programming, and augmented audio for the blind. It also permitted public broadcasters to offer subcarrier services on either a commercial or noncommercial basis. Id. at ¶16.

transmissions when considering the passage of section 399B. On October 22, 1981, a mere few months after passage of the Omnibus Budget Act of which section 399B was a part, the FCC initiated a Notice of Proposed Rule Making to consider authorizing television stations to engage in teletext service.[10] As the Commission stated in its final Report and Order, "Teletext is a new form of radio communication that involves the transmission of textual and graphic data on the vertical blanking interval (VBI) of the video portion of the television signal."[11] The Notice of Proposed Rule Making was provoked by petitions filed by CBS, Inc and United Kingdom Teletext Industry Group, both of whom were interested in developing the VBI for the delivery of teletext.[12] There was extensive awareness of this issue within the industry and public at large.[13] In addition, there is some evidence that members of Congress also possessed such an awareness. For instance, during the notice and comment period, 26 members of the United States Senate signed a letter addressed to the Chairman regarding this issue.[14] Although the letter was dated March 8, 1982 (approximately seven months after passage of what would become section 399B), in light of the massive public participation it seems likely that members of Congress had heard of this issue prior to the spring of 1982 and considered it when crafting section 399B.

The vertical blanking interval was also a technology that was in use as of August

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[10] 46 Fed. Reg. 60851 (published December 14, 1981).

[11] Amendment to the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, Report & Order,48 Fed. Reg. 27054 (1983), ¶1.

[12] Id.

[13] Id. ¶3. The resulting proceeding generated 49 comments and 27 reply comments. Id.

[14] Id. ¶3, n.4.

1981,[15] and is now used in part to transmit closed captioning for deaf and hearing-impaired individuals.[16] It therefore seems unlikely that members of Congress would have been uninformed about the non-broadcast uses of the VBI in 1981, given that it was actively used for such purposes prior to that date.

In general, television auxiliary broadcast stations (also known as the Broadcast Auxiliary Service, or BAS), are licensed for the purpose of transmitting television signals from point-to-point, for example in studio-to-transmitter links. The Commission first authorized television stations to offer the excess capacity of their

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[15] The Vertical Blanking Interval ("VBI") is the portion of the television NTSC broadcast signal that occurs at the beginning of each field after the visual lines of the television screen have been scanned from top to bottom. At that point the electronic beam of the television is turned off and the beam resets itself to begin the next television picture at the top of the screen. When a picture rolls, the black band is the VBI; ordinarily it is invisible and is not directed to the viewing public. The VBI consists of lines 1-21 of the screen, preceding the active video portion of the analog NTSC television signal. See Application for Transfer of Control Arthur Lipper Corporation, 85 F.C.C. 2nd 1023, ¶32 (released December 24, 1980) ("Present day techniques allow the use of the existing 6 MHz MDS channel to transmit data while full video is being transmitted through the use of the vertical blanking interval and unused lines in the television picture.").

[16] Amendment to the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, Report & Order, 48 Fed. Reg. 27054, (1983) ¶23. However the FCC first authorized television stations to operate other data and related communications services on the VBI in 1985 after a notice and comment period that commenced March 21, 1984, a mere three years after the passage of section 399B. In subsequent proceedings, authorized use of the VBI was significantly expanded by the Commission. See In the Matter of Amendments of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, Report & Order, MM Docket 84-168, 101 F.C.C. 2d 973 (1985); and In the Matter of Amendments of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, Notice of Proposed Rule Making, 49 Fed Reg. 10556 (March 21, 1984). See In the Matter of Amendments of the Rules Relating to Permissible Uses of the Vertical Blanking Interval of Broadcast Television Signals, Report & Order, FCC 93-235, 8 F.C.C. Rcd 11 (1993); Digital Data Transmission within the Video Portion of Television Broadcast Station Transmissions, Notice of Proposed Rule Making, FCC 95-155, MM Docket 95-42 (1995); and Digital Data Transmission within the Video Portion of Television Broadcast Station Transmissions, Report & Order, FCC 96-274, MM Docket 95-42 (1996).

broadcast auxiliary facilities (BAS) to others one a for-profit basis in 1983.[17] However, the proceeding began in 1981 – the same year that section 399B was passed – with petitions for rule making filed by PBS and other entities and a Notice of Proposed Rule Making issued by the Commission in November of 1981.[18] In addition, other related non-broadcast issues were discussed in proceedings initiated by the Commission earlier that year.[19] It is likely, therefore, that members of Congress, when considering section 399B, were aware of this non-broadcast use of frequency and may have had it in mind when they penned the phrase, "otherwise transmitted."

The Instructional Television Fixed Service was created by the Commission in 1963, and its purpose was for the transmission of instructional materials to various educational institutions.[20] As such ITFS signals were not designed to be received by the general public and thus were not strictly speaking "broadcast" signals at all. By 1980, there were 82 operating ITFS stations in 27 states.[21] On May 2, 1980, the Commission issued a Notice of Inquiry and Proposed Rule Making and Order, proposing to

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[17] Amendment of Part 74, Subpart F of the Commission's Rules to Permit Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations, Report & Order, BC Docket 81-794, FCC 83-153, 93 F.C.C. 2d 570 (1983).

[18] Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities and New Licensing Policies for Television Auxiliary Broadcast Stations, Notice of Proposed Rule Making, BC Docket 81-794, 46 Fed. Reg. 60024 (November 25, 1981).

[19] See Notice of Proposed Rule Making, Gen. Docket No. 81-272, 46 Fed Reg. 26507, published May 13, 1981 (proposing to allow broadcasters to use the frequencies allocated for common carrier use); Notice of Proposed Rule Making, Gen. Docket No. 81-415, 46 Fed. Reg. 37916, published July 23, 981 (proposing use of the 38.6-40 GHz frequency band for television pickup use). Above cited in Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities and New Licensing Policies for Television Auxiliary Broadcast Stations, Notice of Proposed Rule Making, BC Docket 81-794, 46 Fed. Reg. 60024 (November 25, 1981), ¶1, n.1.

[20] Educational Television, Report and Order, Docket No. 14744, 39 F.C.C. 846 (1963), reconsideration denied, 39 F.C.C. 873 (1964).

[21] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Report & Order, General Docket No. 80-116, FCC 83-243, 94 F.C.C. 2d 1203, (1983), ¶19.

reallocate spectrum for the ITFS.[22] This proceeding generated comments and reply comments by approximately 200 entities and culminated in a 1983 Report and Order. During the pendency of this proceeding, section 399B was passed as part of the Omnibus Budget Act. Therefore, in light of the pending proceeding in which so many parties participated, it is a reasonable assumption that when members of Congress wrote the words, "otherwise transmitted," they had ITFS transmissions in mind as well.

Cable television (also called CATV or community antenna television) was developed in the late 1940's for communities unable to receive TV signals because of terrain or distance from TV stations. Cable television system operators located antennas in areas with good reception, picked up broadcast station signals and then distributed them by coaxial cable to subscribers for a fee.[23] As such, cable systems have traditionally been a source of "otherwise transmitted" signals, apart from a television station's direct broadcast to the public. In view of its ubiquitous presence in 1981, it is likely that Congress also knew of the presence of cable delivery systems and anticipated that television signals could be otherwise transmitted over cable lines in lieu of over-the-air broadcast.

D. CONCLUSION

Although the legislative history of Section 399B is not particularly voluminous, there is substantial evidence that when Congress made the distinction between broadcast signals and signals "otherwise transmitted," it was aware of several forms of "non-broadcast" signal transmission, including teletext, VBI, BAS, ITFS and cable, as well as various precursors to the above.

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[22] 45 Fed. Reg. 29232 (1980).

Given the availability of these technologies in 1981, it is reasonable to assume that in using the statutory language "otherwise transmitted," Congress was referring to these "non-broadcast" technologies that were established in the industry. The plain language of the statue restricts the advertising prohibition to broadcast, leaving these other established technologies open for advertiser supported/revenue generating services. This reading of the statute is completely consistent with former Commission rulings.[24] This reading is also fully consistent with a determination that the advertising prohibition in 399B does not extend to ancillary or supplementary digital services.

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[23] http://www.fcc.gov/csb.

[24] See for instance, regarding the Vertical Blanking Interval: In the matter of Amendments of Parts 2, 73 and 76 of the Commission's rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, Report & Order, MM Docket 84-168, 101 F.C.C. 2d 973 (1985), ¶22 ("We therefore will allow public television stations to use the VBI for ancillary telecommunications services in the manner as commercial broadcasters and to operate such services on a remunerative basis."). Regarding broadcast auxiliary facilities: Amendment of Part 74, Subpart F of the Commission's rules to Permit Shared Use of Broadcast Facilities with other Broadcast and Non-broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations, Report & Order, FCC 83-153, BC Docket 81-794, 93 F.C.C. 2d 570 (1983), ("We are of the opinion that [noncommercial] broadcast licensees should be permitted to offer the excess capacity of their auxiliary facilities to others on a for-profit basis."), ¶18. Regarding the use of aural baseband subcarrier: 47 C.F.R. Parts 2 and 73; The Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters, 2nd Report & Order, 49 Fed. Reg. 18100 (May 7, 1984), FCC 84-116 ("The record supports our initial proposition ... that public broadcasters should be permitted, at their discretion, to offer subcarrier services on either a commercial or noncommercial basis."), ¶16. Regarding teletext: Amendment to the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, Report & Order, 48 Fed. Reg. 27054, (1983), ("Public stations are permitted the same discretion with respect to services and technical systems as commercial systems .... There is nothing in the Act to indicate that Congress intended to prohibit public broadcasters from offering such enhanced services."), ¶¶ 50, 52.